No. 97-1252

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

JANET RENO, et al.,
Petitioners,
v.
AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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Pursuant to this Court's Rule 37.3, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief urging the Court to uphold the judgment of the Court of Appeals for the Ninth Circuit that the District Court below has jurisdiction to hear the claims of the respondents herein.[1]

STATEMENT OF INTEREST

The ABA is a voluntary national membership organization of the legal profession. The ABA has over 400,000 members representing every state and territory and the District of Columbia. Its membership and constituency include prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and correction personnel, law students and a number of non lawyer associates in related fields.

The ABA has a historic interest in questions concerning the jurisdiction of federal courts to hear and decide claims by aliens seeking fair enforcement and implementation of our nation's immigration laws in accordance with the Constitution. Consistent with its objective of securing fair and constitutional implementation of immigration laws, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, consisting of representatives of nine ABA entities with relevant and specialized expertise (*e.g.*, in administrative law), has assisted in organizing numerous *pro bono*

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[1]This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members or its counsel have made a monetary contribution to the preparation or submission of this brief.

immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in deportation proceedings and represent them on appeal. The ABA has previously submitted briefs as *amicus curiae* in several matters before this Court concerning the rights of aliens seeking to remain in this country to obtain judicial review, including *McNary v. Haitian Refugee Center,* 498 U.S. 479 (1991) (supporting district court jurisdiction to hear broad-based challenge to INS procedures affecting resident alien farmworkers) and *Ardestani v. INS,* 502 U.S. 129 (1991) (in support of interpreting Equal Access to Justice Act to apply to deportation proceedings).

The ABA appears as *amicus curiae* in the case because the question presented herein has serious implications for the access of immigrants and other parties to an effective forum for judicial review of administrative agency action, particularly with respect to judicial review of constitutional claims arising from agency practices and procedures.[2]

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* respectfully refers the Court to the statement of the case contained in the Respondents' Brief for a full description of the facts relevant to the resolution of the question presented.

SUMMARY OF ARGUMENT

On this appeal, Petitioners erroneously contend that Section 242 of the Immigration and Naturalization Act

[2]Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial or individual member of the ABA. No inference should be drawn that any member of the Judicial Division of the ABA has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council of the ABA prior to filing.

("INA") as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), divests the federal district courts of jurisdiction over constitutional claims arising from a decision by the Immigration and Naturalization Service ("INS") to initiate deportation proceedings against Respondents.

This Court has consistently held that congressional enactments regarding the jurisdiction of federal courts must be interpreted to permit meaningful judicial review of colorable constitutional claims, in order to avoid the grave constitutional questions that would arise if Congress were to foreclose review of such claims. Based on this concern, this Court has narrowly construed administrative review provisions that appear facially to preclude review of the merits of an administrative determination prior to the exhaustion of administrative remedies, in order to permit adequate and timely review of constitutional claims.

In interpreting Section 242 of the INA, as amended by Section 306 of IIRIRA, the ABA urges that this Court ensure that aliens' access to a meaningful forum for vindication of their constitutional rights is preserved by providing, in appropriate cases, for prompt review of colorable constitutional claims in the federal district courts. Where, as here, a constitutional claim requires the development of a factual record for proper resolution, meaningful review requires access to the district courts, which are the only federal judicial fora capable of developing an adequate factual record. Moreover, in this and many other cases, access to the federal district courts at the outset would serve Congress' dual goals of providing meaningful review of constitutional claims and of efficient administration of the immigration laws.

ARGUMENT

A. PROVISIONS OF IIRIRA MUST BE CONSTRUED TO AFFORD RESPONDENTS A FORUM FOR MEANINGFUL JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS.

1. In construing congressional enactments governing the jurisdiction of the federal courts, this Court has long recognized that grave questions of constitutional law, implicating principles of separation of powers and due process, would arise if Congress deprived Article III courts of the power to review colorable constitutional claims. *E.g., Webster v. Doe,* 486 U.S. 592, 603 (1988); *Califano v. Sanders,* 430 U.S. 99, 109 (1977). Due to these grave concerns, the Court has adopted a strong presumption that Congress does not intend to intrude upon the courts' power and duty to assure that the government acts within constitutional limits. *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) (citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 1263 (1803)); *United States v. Nourse,* 34 U.S. (9 Pet.) 8, 28-29 (1835). Because of the importance of providing judicial review of administrative action for claimed constitutional defects, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967); *accord, Lincoln v. Vigil,* 508 U.S. 182, 195 (1993). This Court moreover, in applying such principles, has consistently interpreted congressional enactments in a manner that would assure that constitutional violations would not be insulated from Article III review. *See e.g., Johnson v. Robison,* 415 U.S. 361, 367-73 (1974) (holding that statute purporting to preclude review over all claims did not affect jurisdiction over constitutional claims); *see also,* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise,* § 17.9 (1994).

The Court has also stressed that judicial review of constitutional claims must be provided at a time and in a manner that would render such review *meaningful.* Thus, even where statutory language appears at first blush to require exhaustion of administrative remedies, such provisions have been interpreted to preserve initial district court jurisdiction over claims that would otherwise escape meaningful review. *See Bowen, supra; Traynor v. Turnage,* 485 U.S. 535, 544-45 (1988); *Matthews v. Eldridge,* 424 U.S. 319, 326-32 (1976). Notwithstanding seemingly-applicable exhaustion requirements, the Court has "upheld district court jurisdiction over claims considered wholly collateral to a statute's review provisions and outside the agency's expertise . . . where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212-13 (1994) (internal quotations and citations omitted); *McNary v. Haitian Refugee Center,* 498 U.S. 479, 496-97 (1991) (upholding district court jurisdiction over due process challenge to INS procedure where application of review provision would preclude "meaningful judicial review").

2. Although the government contends that this canon of constitutional law and statutory interpretation applies with less force when the party seeking review is an alien, Pet. Br. at 39-40, this Court has never suggested that the constitutional significance of meaningful judicial review is diminished in the immigration context. Indeed, the nature and magnitude of the liberty interest at stake counsels that access to meaningful judicial review is particularly important to an alien facing deportation. The significance of an alien's due process interest in avoiding wrongful deportation cannot be overstated. As James Madison observed:

> If the banishment of an alien from a country into which he has been invited . . . where he may have formed the most tender of connections, where he may have vested his

> entire property and acquired property . . . and where he may have nearly completed his probationary title to citizenship . . . , if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the norms can be applied.

Mr. (James) Madison's Report, General Assembly of Virginia (January 7, 1800) (reprinted in The Virginia Commission on Constitutional Government, The Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799, 36 (1960)).

Consistent with these concerns, this Court has repeatedly recognized that the protections of the Due Process Clause of the Fifth Amendment apply to all persons within the United States, including aliens. *See e.g., Wong Wing v. United States,* 163 U.S. 228, 238 (1896); *United States v. Mendoza-Lopez,* 481 U.S. 828, 838 (1987). In particular, the Court has held without exception that, in light of the significant deprivation that deportation imposes on the liberty of an alien, meaningful judicial review of the lawfulness of the deportation order is required. *See Landon v. Plasencia,* 459 U.S. 21, 35 (1982) (the court, not Congress or the INS, must determine "whether the [deportation] procedures meet the essential standard of fairness under the Due Process Clause").[3]

Judicial review is also particularly important in this context given the frequency with which deportation orders or related proceedings have been found unlawful. The federal

[3]*See also, Bridges v. Wixon,* 326 U.S. 135, 154 (1945) ("Meticulous care must be exercised lest the [deportation] procedure . . . not meet the essential standards of fairness."); *Yamataya v. Fisher,* 189 U.S. 86, 101 (1903); *Ng Fung Ho v. White,* 259 U.S. 276, 285 (1922); *Turner v. Williams,* 194 U.S. 279, 295 (1904) (Brewer, J., concurring) ("I do not believe it within the power of Congress to give ministerial officers a final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts.").

courts have played an indispensable role in vindicating the constitutional rights of aliens against the INS's disregard of constitutional limitations on its authority. Courts have found that aliens in agency proceedings have been subjected to, for example: procedures that indisputably failed to satisfy the minimum standards of due process, *see McNary,* 498 U.S. at 487-89; a scheme to meet numerical targets for removal of Haitians at the expense of their rights to seek asylum in this country, *see Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1029-32 (5th Cir. 1982), *disapproved on other grounds, Jean v. Nelson,* 727 F.2d 957, 976 n. 27 (11th Cir. 1984); and a pattern and practice of using misrepresentations, intimidation, coercive detention and transfer policies, and other measures intended to dissuade Salvadoran refugees from raising claims of asylum, *see Orantes-Hernandez v. Meese,* 685 F. Supp. 1488, 1494-1503 (C.D. Cal. 1986), *aff'd sub nom. Orantes-Hernandez v. Thornburgh,* 919 F.2d 549 (9th Cir. 1990).[4]

[4]Given the significant liberty interest implicated, review of statutory claims are equally necessary in the deportation context. *See Estep v. United States,* 327 U.S. 114, 123 n. 14 (1946) (even where Congress has made a deportation order "final," court retained power to review administrative decision to determine whether it had basis in fact). Even with respect to whether a deportation order is valid as a statutory matter, the agency's determinations have historically been found erroneous in a significant number of cases. *See* P. Schuck and T. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990,* 45 Stan. L. Rev. 115, 167 (1992) (finding that aliens prevailed in the courts in approximately 23-36% of "statutory cases" principally involving final orders of deportation or exclusion between 1979 and 1990). As the Seventh Circuit has recently acknowledged, "The proceedings of the [INS] are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality." *Salameda v. INS,* 70 F.3d 447, 449 (7th Cir. 1995) (Posner, C.J.). *See also INS v. Cardoza-Fonseca,* 480 U.S. 421, 452 (1987) (Blackmun, J., concurring) (commenting on the INS's "seemingly purposeful blindness" to a statutory "standard entrusted to its care").

3. The importance of the interest at stake and the historical prevalence of constitutional violations in this particular context counsel in favor of an unflinching application of the presumption in favor of meaningful judicial review. Courts have consistently found jurisdiction over challenges to the procedures and policies employed by the INS prior to the commencement of deportation proceedings, in recognition of the importance of providing meaningful judicial review and of the unsuitability of the procedures governing review of an order of deportation (*e.g.*, 8 U.S.C. § 1105a (1994)) for review of collateral claims that require a factual record for proper resolution. *See McNary, supra; Smith,* 676 F.2d at 1032-33; *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984), *aff'd as to remand,* 472 U.S. 846 (1985). As the Third Circuit noted after surveying the caselaw, the district courts were deemed to retain their general federal question jurisdiction under 28 U.S.C. § 1331 "when the challenged administrative practice, policy or regulation precluded adequate development of the administrative record and consequently meaningful review through the procedures set forth in § 1105a, and/or when the challenged practice was collateral and divorced from the substantive aspects underlying the alien's claim of asylum." *Yi v. Maugans,* 24 F.3d 500, 506 (3d Cir. 1994).[5]

[5]The doctrine that matters collateral to an order of deportation or issues requiring factual development are not within the scope of the former § 1105a has its genesis in this Court's opinion in *Cheng Fan Kwok v. INS,* 392 U.S. 206 (1968), as well as in the Court's jurisprudence in general administrative law cases noted above. In *Cheng Fan Kwok,* the Court held that § 1105a's limitation on district court jurisdiction extended only to "final orders of deportation" and did not encompass matters that could not be determined in deportation proceedings, such as whether regional INS district directors lawfully exercised their discretion to stay deportation of an otherwise removable alien. If the alien seeks review of such collateral matters, the Court stated, "the alien's remedies would, of course, ordinarily lie first in an action brought in the appropriate district court." *Id.* at 210. As noted, numerous courts of appeals have followed this instruction and concluded that judicial review of matters not encompassed by a final order of deportation (thus outside the scope of the exclusive review provisions of § 1105a) were properly raised in an original action brought in the federal district courts. *E.g., Olaniyan v. INS,* 796 F.2d 373, 376-77 (10th Cir. 1986); *Tooloee v. INS,* 722 F.2d 1434, 1437-38 (9th Cir. 1983); *see Gottesman v. INS,* 33 F.3d 383, 387 (4th Cir. 1994) (collecting cases).

Accordingly, Section 242 of the INA, as amended by IIRIRA, should be interpreted to preserve district court jurisdiction upon which these courts relied to vindicate important constitutional and statutory rights of aliens facing deportation.

B. MEANINGFUL ACCESS TO JUDICIAL FORUM MAY, IN APPROPRIATE CIRCUMSTANCES, REQUIRE PROMPT ACCESS TO THE DISTRICT COURTS.

Under this Court's jurisprudence, the theoretical availability of access to a judicial forum is not enough to provide meaningful review of a constitutional claim. Thus, the Court has found that appellate court review of a claim that requires a factual record for proper resolution — a record that the agency would not and the court of appeals could not develop — is insufficient. *McNary, supra.* The Court has also cautioned that a review procedure that would cause irreparable injury to be suffered in the interim is inadequate. *Matthews v. Eldridge, supra.* These considerations demonstrate that Petitioners' proposed procedures for judicial review of claims would be inappropriate in this and many other cases.

1. The Court's opinion in *McNary, supra,* is illustrative of the importance of a factual record for meaningful review of a constitutional claim. In *McNary,* a class of aliens challenged the INS's procedures for determining an alien's eligibility for legalization of his or her status. The respon-

dents in *McNary* claimed (and the Court agreed) that INS procedures did not apprise them of the evidence against them, afford them an opportunity to rebut such evidence or present witnesses, or provide them with interpreters that would allow them to communicate effectively with the adjudicator. 498 U.S. at 487-89. The judicial review provision at issue in *McNary*, 8 U.S.C. § 1160(e), precluded review of an adverse determination and provided that judicial review could be obtained in the court of appeals pursuant to § 1105a if and when an order of deportation was issued. However, the Court held that this procedure failed to provide for a meaningful review of the aliens' claims.

Evidence of such constitutional defects in INS procedures "would have been irrelevant in the processing of a particular individual application." *Id.* at 497. The agency's administrative review process did not address the kind of procedural and constitutional claims brought by the respondents, and the record of proceedings in any individual eligibility determination would not have included evidence pertaining to the INS's procedures and practice. *Id.* at 493. Under such circumstances, the Court held, limiting review to the court of appeals after an order of deportation had issued, and then only on the record of the administrative proceedings, would result in the denial of meaningful judicial review. *Id.* at 496 ("if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review"). Because the courts of appeals "lack[ed] the factfinding and record-developing capabilities of a federal district court," the possibility that the respondents in *McNary* would eventually have access to the court of appeals was deemed insufficient to satisfy the requirement of meaningful review. *Id.* at 497. Thus, the Court's opinion in *McNary* confirmed that § 1105a did not apply to a collateral claim that required the development of a factual record in the district courts.

The factors that formed the bases of the Court's holding in *McNary* are fully applicable to Respondents' claim. As in *McNary*, Respondents do not challenge in the District Court proceeding the substantive grounds on which the charges against them are purportedly based, such as whether they have failed to maintain student status or overstayed their visas. As Petitioners concede, evidence regarding the agency's motivation in deciding to initiate proceedings against these Respondents or evidence regarding the agency's conduct towards similarly situated aliens — *i.e.*, evidence pertaining to the elements of Respondents' selective enforcement claim — would be irrelevant and could not be developed in agency proceedings.[6] Accordingly, applying the exclusive *appellate* jurisdiction of the former § 1105a, or

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[6]The need for a factual record distinguishes the instant case from this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), a case which *amicus curiae* Criminal Justice Legal Foundation contends brings Respondents' claim within the scope of exclusive appellate review procedures of § 1105a. In *Chadha*, the Court held that the appellate courts had jurisdiction to determine the constitutional validity of the "legislative veto" on a petition for review of a final order of deportation, because such an order "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *Id.* at 937. *Amicus* fails to distinguish, however, between legal issues (*e.g.*, constitutional validity of the legislative veto) implicated by a deportation order and issues requiring a factual record for proper resolution. Even if *Chadha* establishes appellate jurisdiction, pursuant to § 1105a, to resolve a legal claim requiring no fact finding, such review would not be applicable to Respondents' selective enforcement claim, given the need for a factual record. *See Olaniyan*, 796 F.2d at 376; *Tooloee*, 722 F.2d at 1437.

Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996), a case which Petitioners erroneously contend is in conflict with the opinion below, is not to the contrary. The court in *Massieu* held that a challenge to the constitutionality of Section 241(a)(4)(C)(i) of the INA should be brought in the court of appeals pursuant to § 1105a. As the district court in that case noted, because the case involved a facial challenge to the constitutionality of a statute, the "claims . . . present[ed] 'pure questions of law' for

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the new § 1252(a), to Respondents' claim would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *McNary*, 498 U.S. at 497.[7]

2. Recognizing the need for developing a factual record and reversing their consistent position over many years,[8] Petitioners urge that Respondents can receive meaningful

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which no agency fact-finding would be required or even marginally illuminating." *Massieu v. Reno*, 915 F. Supp. 681, 694 (D. N.J. 1996). The Third Circuit did not question the proposition that general federal question jurisdiction would remain available for claims that could not be meaningfully reviewed in the court of appeals for want of a factual record. *See* 91 F.3d at 423 (quoting *Maugans, supra*).

[7]Other factors considered relevant in *McNary* also favor the exercise of district court jurisdiction in this case. Like the statute at issue in *McNary*, the provisions of § 1252(b)(4)(A) and the former § 1105a(a)(3) both require the court of appeals to limit its consideration to the administrative record, thereby appearing to preclude the consideration of additional evidence in the court of appeals. Moreover, IIRIRA provides that the "administrative findings of fact are conclusive unless *any* reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (emphasis added); *see also* 8 U.S.C. § 1105a(a)(4) (1994) (imposing similar standard of deference to agency fact finding). This deferential standard of review is arguably even more stringent than the abuse of discretion standard at issue in *McNary*, which the Court noted should not apply to review of facts applicable to constitutional claims, 498 U.S. at 494, and indicates that § 1252(a) likewise should not govern Respondents' claim.

[8]Prior to this case, the INS had consistently (and successfully) argued that a remand to the district court pursuant to § 2347(b) was contrary to the requirement that the validity of an order of deportation was to "be determined solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4) (1994). *See e.g., Coriolin v. INS*, 559 F.2d 993, 1003 & n. 14 (5th Cir. 1977); *Ghorbani v. INS*, 686 F.2d 784, 787 n. 4 (9th Cir. 1982). A notable exception was in *McNary*, where the INS argued in its reply brief that

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review of their claim if the Court interprets 28 U.S.C. § 2347(b) to authorize the court of appeals, on an appeal from a final order of removal, to remand the case to the district court for the development of a factual record. Regardless of whether a remand procedure under § 2347(b) is available or appropriate in some situations, a remand to the district court will not always assure that a constitutional claim would be afforded meaningful review.

a. First, Petitioners seek to require a threshold evidentiary showing that would "as a practical matter" foreclose meaningful judicial review. *McNary*, 498 U.S. at 497. Under Petitioners' proposal, the alien would be required "*at the time the petition for review is filed,* to proffer specific evidence indicating that the decision to initiate deportation proceedings had been made for a constitutionally forbidden reason." Pet. Br. at 48-9 n. 23 (emphasis added). Remand would then be allowed "only in the very rare case where the court of appeals concludes that the alien's submission, if credited, refutes the government's explanation for the charging decision [and] therefore, requires resolution of disputed questions of material fact." *Id.*

Petitioners fail to note that evidence of the government's reasons underlying its charging decisions are exclusively in the control of the government. Accordingly, such evidence would be inaccessible to aliens as a general matter without

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such a remand is in fact available under § 2347(c) or § 2347(b)(3). *See* Reply Brief for the Petitioners, 1989 U.S. Briefs (LEXIS) 1332, Part (b) & n. 10. In subsequent cases before the courts of appeals, however, the INS reversed its position again and argued that § 1105a(a)(4) prohibits the court of appeals from considering evidence not contained in the record of the agency proceeding. *See e.g., Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995); *Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991).

the discovery procedures available in the district courts.[9] As noted, deportation proceedings do not allow the alien to inquire into or discover evidence regarding the bases of the charging decision or violations of agency procedure — an inquiry that is beyond the jurisdiction of an immigration judge. Accordingly, an alien "at the time the petition is filed" will almost never have access to such evidence and would be wholly unable to rebut the government's explanation of its motives.

As this case demonstrates, Petitioners' proposed evidentiary hurdle will foreclose potentially meritorious claims. Specific evidence regarding the INS's improper motive in initiating the proceedings against Respondents was uncovered during the course of the district court litigation and not before. For example, statements by the INS regional counsel that the government sought to deport Respondents for their membership in the PFLP (Pet. App. 82a) or FBI memoranda urging the deportation of Respondents for protected First Amendment activities (JA 130-206) resulted from or were discovered in the district court litigation. Based on the evidence developed during the course of the litigation, the District Court found and the Court of Appeals

[9] Petitioners' proposed standard — in its search for a disputed issue of fact and in its allocation of burdens — evokes the standard applicable to a summary judgment motion under Fed. R. Civ. P. 56. However, such drastic summary procedures may not be used to cut off a claim at its inception where a party has not been afforded any discovery. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Moreover, Petitioners' proposal is inconsistent with this Court's recent holding that a criminal defendant is entitled to discovery of the government's reasons for prosecuting particular cases if the defendant makes "a credible showing of different treatment of similarly situated persons." *United States v. Armstrong*, 517 U.S. 456, 470 (1996). Such a showing can be made by the use of statistics, *i.e.*, type of evidence *not* exclusively in the government's control, *see id.* at 469-70, and does not require a defendant to "refute[ ]" the government's explanation of its motive.

affirmed that Respondents have a reasonable probability of success on the merits of their claim. Had Respondents been required to produce specific evidence of the government's motive at the outset, as Petitioners propose, Respondents' claim would not have been given adequate judicial review.

b. Moreover, Petitioners' contention ignores the doctrine that, where irreparable injury would result from a delay in the resolution of a constitutional claim, meaningful review may require access to the district courts in the first instance. This Court has admonished that exhaustion requirements are not to be mechanically applied "where the petitioner has made a colorable showing that full postdeprivation relief could not be obtained." *Thunder Basin Coal Co.*, 510 U.S. at 213 (citing *Matthews*, 424 U.S. at 331). As the Court stated in *Aircraft & Diesel Equip. Corp. v. Hirsch:*

> [T]he presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending *irreparable injury flowing from delay incident to following prescribed procedure*, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.

331 U.S. 752, 773 (1947) (emphasis added). The Court of Appeals below correctly recognized "[t]he 'core principle'. . . that statutory requirements should not be construed to cause 'irreparable injuries to be suffered' or the loss of 'crucial collateral claims.'" *AADC v. Reno*, 70 F.3d 1045, 1057 (9th Cir. 1995) (quoting, *Matthews*, 424 U.S. at 331 n. 11); *see also Matthews*, 424 U.S. at 333 (due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

Nothing in IIRIRA suggests that Congress intended to preclude district court jurisdiction to issue injunctive relief in order to prevent irreparable harm to aliens against whom deportation proceedings have already commenced. Indeed, the legislative history of Section 306 of IIRIRA demonstrates the contrary. In discussing 8 U.S.C. § 1252, and referring in particular to § 1252(f), the House Committee on the Judiciary noted that:

> Section 306 also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation. These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, *courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights.* However, *single district courts* or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.

H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (emphases added).

The Committee's report illuminates two aspects of congressional intent relevant to the proper interpretation of IIRIRA. First, Congress clearly contemplated that "lawsuits" could be brought in the "district courts" seeking to restrain the operation of the provisions of IIRIRA. Second, the Committee stated that injunctive relief pertaining to the case of an alien would be available in order to "protect against any *immediate* violation of rights," indicating Con-

gress' intent that proceedings that would violate an alien's constitutional rights may be enjoined at the outset.[10]

In this case, Respondents challenge the INS's decision to selectively enforce the immigration laws against them based on their associational activities protected by the First Amendment. It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality op.) (citing *New York Times, Co. v. United States,* 403 U.S. 713 (1971)). In light of this concern, the Court has repeatedly emphasized in a variety of contexts the necessity for prompt resolution of colorable First Amendment claims. For example, the Court has stressed that state courts, when enjoining activity potentially protected by the First Amendment, must provide "strict procedural safeguards, including immediate appellate review." *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43, 44 (1977) (citations omitted). The Court has also applied a relaxed standard of finality in determining whether lower court rulings are appealable,

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[10]Congress' understanding of § 1252(f), as shown in the House Report, also demonstrates that the Court of Appeals correctly ruled that § 1252(g) incorporates § 1252(f) by reference. Given that Congress intended to allow access to the district courts for aliens to whom § 1252(f) applies, Petitioners' interpretation of § 1252(g) would lead to the anomalous result that *only* those aliens who had been in deportation proceedings prior to the effective date of other provisions of § 1252 would be denied access to the district courts. Under that view, such aliens would be subject to a *stricter* limitation on access to judicial review than aliens to whom Congress intended *all* provisions of IIRIRA to apply. Such an interpretation would be flatly inconsistent with Petitioners' own premise that Congress intended IIRIRA generally to limit judicial review from that which was available under prior law. Thus, *amicus* submits that it is far more consistent with the intent of Congress to construe § 1252(g) as incorporating the *jurisdiction preserving* elements of other subsections of § 1252, such as § 1252(f)(1), prior to their nominal effective date.

where uncertainty regarding important questions of First Amendment law would likely deter the free and unfettered exercise of speech. *E.g., Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 54-56 (1989); *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 485-86 (1975). Finally, the Court has "allowed persons subject to claimed unconstitutional restrictions on their freedom of expression to challenge that restriction" without resorting to designated administrative procedure, in cases where "the loss or postponement of precious First Amendment rights . . . was a concomitant of the available administrative procedure." *Moore v. City of East Cleveland,* 431 U.S. 494, 528 n. 3 (1977) (Burger, C.J., dissenting). *Cf. PUC of California v. United States,* 355 U.S. 534, 540 (1958) ("where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right"); *McCarthy v. Madigan,* 503 U.S. 140, 148 (1992).

Similarly here, the inability to obtain a prompt determination of constitutional claims implicating the First Amendment would have the impermissible effect of silencing the contributions of aliens to the public debate on matters of national and international concern. Without prompt access to the district courts, aliens may be subjected to selective enforcement of the immigration laws for protected activities without being able to present their claims to *any* adjudicatory body until deportation proceedings and administrative appeals that routinely take years to complete have concluded.[11]

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[11] This fact establishes the crucial distinction between the instant case and this Court's cases holding that, even where the First Amendment is implicated, federal courts ordinarily should not enjoin pending state court proceedings, such as *Cameron v. Johnson,* 390 U.S. 611 (1968), (continued)

Other types of irreparable injuries may also necessitate prompt judicial review in the district courts. For example, the INS's practice of coercing aliens with potentially meritorious asylum claims to agree to voluntarily depart the country, a practice that was enjoined in *Orantes-Hernandez, supra,* would present another compelling case of irreparable injury — once an alien is coerced into "voluntarily" departing, the statutory right to seek asylum and the constitutional right to minimally adequate procedure can no longer be vindicated. Accordingly, the Court should refrain from holding that the exclusive review provisions of § 1252 can be mechanically applied to all claims that arguably fall within its reach.

C. PROVIDING PROMPT ACCESS TO DISTRICT COURTS FOR RESOLUTION OF COLLATERAL CLAIMS PROMOTES THE EFFICIENT ADMINISTRATION OF IMMIGRATION LAWS AND IS CONSISTENT WITH CONGRESSIONAL INTENT.

Although Petitioners contend that they rely upon the purported intent of Congress in enacting IIRIRA to streamline, consolidate and expedite the process of removing an alien from the United States, the goals of judicial and administrative efficiency and expedited removal can and will be served in appropriate instances by permitting initial review of a collateral claim. As the Court has noted, the

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(continued)
upon which Petitioners rely. Under the Supremacy Clause, state courts are required to hear a defendant's federal claims in the first instance. *See e.g., Howlett v. Rose,* 496 U.S. 356 (1990). Moreover, consistent with principles of federalism, state courts are presumed equally capable as federal courts of providing an adequate hearing to such claims. *See e.g., Younger v. Harris,* 410 U.S. 37 (1971). Neither consideration applies to the proceedings of the immigration courts, which could not even consider Respondents' constitutional challenge.

"application of the exhaustion doctrine is 'intensely practical' " and should be "guided by the policies underlying the exhaustion requirement." *Bowen v. City of New York,* 476 U.S. 467, 484 (1986) (quoting *Matthews,* 424 U.S. at 331 n. 11); *Abbott Laboratories,* 387 U.S. at 149-50 (stating that doctrine of finality may be applied in a "pragmatic" and "flexible" way); *see also Rafeedie v. INS,* 880 F.2d 506, 529-30 (D.C. Cir. 1989) (Ginsburg, C.J., concurring) (Congress does not "in codifying an exhaustion rule, . . . inevitably and inexorably mean[ ] to preclude early judicial review even when requiring exhaustion in a specific case would serve none of the purposes motivating the requirement and would threaten grievous harm to the person seeking review"). In this and many other cases in which the courts have found district court jurisdiction, the interpretation of IIRIRA urged by Petitioners would fail to serve the intent of Congress to expedite resolution of claims relating to the removal of aliens.

1. In this case, adopting the government's proposal would neither eliminate any layer of judicial review nor lead to a more expeditious removal (assuming that removal would be lawful) of Respondents. As noted, Respondents' claim is entirely collateral to the determination of whether they are deportable on the basis of the substantive charges against them. *See City of New York*, 476 U.S at 483. Because Respondents' claim is outside the scope of INS's decisional authority, Respondents would be required under Petitioners' proposal to go through the multiyear process of deportation hearings and administrative appeal, while holding their constitutional claim in abeyance. At the conclusion of that process, they would present their claim to the court of appeals for determination as to whether a remand is necessary, adding another element to the court of appeals' tasks on direct review of an order of removal.

Accepting the District Court's preliminary findings (affirmed by the Ninth Circuit) regarding the merits of Respondents' claim, a remand would be necessary even under the stringent standard proposed by Petitioners.[12] Once the case is remanded to the district court, a hearing on the claim of selective enforcement would then begin. At the conclusion of district court proceedings, the court of appeals would then review that judgment and either uphold or invalidate the orders of removal accordingly. If Respondents ultimately prevail, the significant burdens of the deportation proceedings — on Respondents, on the government and on the free speech interests of Respondents and others — would have been incurred for no purpose. If the government ultimately prevails, it would have done so without eliminating any layer of review: indeed, Petitioner's proposal would have added an additional layer of appellate court review.[13]

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[12] Due to the lack of discovery, Respondents would not likely be able to present the evidence upon which the District Court's findings were based. That possibility, of course, provides no warrant for favoring Petitioners' approach. *See* Part B.2, *supra.*

[13] Although Petitioners raise the specter of unmeritorious or frivolous cases brought in the district courts for the sole purpose of delaying deportation proceedings, declaratory judgment actions in this context are extremely rare. According to INS statistics, 1,648,986 aliens were apprehended by the INS in 1996. Immigration & Naturalization Service, *1996 Statistical Yearbook*, 173, Table 58 (1996). The vast majority (1,572,798) departed voluntarily, while over 68,000 aliens were deported or excluded pursuant to an order of removal. *Id.* In comparison, federal courts resolved only 138 declaratory judgment actions (the bases for which are not revealed by the statistics) brought against the INS involving exclusion or deportation. *Id.*, 194, Table 76. Allowing appropriate cases to go forward in the district courts under the standards developed by the federal courts in interpreting former § 1105a, therefore, will not result in the district courts being inundated with frivolous suits. Moreover, the district courts are certainly capable of assessing the merits of such cases and properly refusing to enjoin any agency proceedings.

On the other hand, if the District Court properly has jurisdiction over Respondents' suit, and Respondents prevail on the merits, a needless and unlawful administrative process would have been avoided. The Court of Appeals would not have the burden of direct review of orders of removal on the merits as well as considering the constitutional claim. Thus, there is no reason to believe that Petitioners' proposal, as opposed to Respondents' interpretation of IIRIRA, better effectuates Congress' intent to expedite the process of removal and lighten the burdens on the courts and the agency. *Cf. Cox Broadcasting*, 420 U.S. at 485-87 (requirement of finality must be given pragmatic application so that unnecessary proceedings would be avoided in appropriate cases).

2. Indeed, in many of the cases where district court jurisdiction was previously found, Petitioners' proposed procedure would have resulted in an enormous waste of judicial and administrative resources. In these, so-called "pattern and practice" cases, the validity of a deportation order on the merits is not at issue: rather, the claimed defect is that the agency has systemically violated, through its policies and procedures, the constitutional and statutory rights of a broad class of aliens in adjudicating their immigration status. *See McNary, supra; Haitian Refugee Center v. Smith, supra; Orantes-Hernandez, supra; Jean v. Nelson, supra; Walters v. Reno,* 145 F.3d 1032 (9th Cir. 1998); *Walters v. Reno,* No. C94-1204C, 1996 WL 897663 (W.D. Wash. Oct. 2, 1996); *Montes v. Thornburgh,* 919 F.2d 531 (9th Cir. 1990); *Campos v. Nail,* 940 F.2d 495 (9th Cir. 1991); *El Rescate Legal Serv. v. EOIR,* 959 F.2d 742 (9th Cir. 1991). Here again, application of the exhaustion requirement would ill-serve the policies underlying the requirement.

If an alien facing deportation cannot bring a broad-based challenge to the agency's pattern of unlawful behavior, the agency would devote substantial resources and subject the alien to the burdens of administrative proceedings in order

to issue an order of removal that would be valid on the substantive grounds alleged but may be defective on a collateral constitutional or statutory ground. Given that the agency will not entertain the alien's claim during the administrative proceedings, and that no judicial determination thereof can be made until the proceedings conclude, the agency would presumably continue to subject other aliens to the same unlawful practices in the meantime. By the time that such a claim could be reviewed in the federal courts, this may result in innumerable removal orders (and *actual removals*) of uncertain validity.

If the alien's claim is ultimately upheld, the agency would have wasted considerable resources in issuing removal orders that suffer from the same defect. At that point, the agency would have two choices. It could attempt to reargue the merits of the court's ruling upon review of each and every order of removal affected by the unlawful practices, resulting in a great deal of waste of judicial and administrative resources and possibly in inconsistent outcomes. In the alternative, the agency could reopen the deportation proceedings in a large number of cases and, having abandoned the unlawful practices, reassess the removal orders. In any event, a large number of aliens that would have been removable on the merits would receive the windfall of continuing their presence in this country for the duration of the new administrative and/or judicial proceedings, a result which Petitioners contend was the principal evil that Congress sought to address by the exclusive review provisions of the INA. Pet. Br. at 20-21 n. 7.

On the other hand, if such "pattern or practice" cases may be heard in the district court in the first instance, both the agency and aliens facing deportation would be able to obtain a prompt resolution of the claim and proceed to the administrative proceeding on the merits. Such claims could be adjudicated on a class-wide basis, as has been the normal

practice in the federal courts, eliminating the wasteful litigation of identical factual issues on review of each removal order affected by the unlawful practice. Even a prompt judicial determination of an individual claim would as a practical matter reduce the number of cases that may be infected by unlawful agency practices and procedures, and ensure that substantively valid removal orders can be quickly executed. Accordingly, in such cases, Petitioners' proposed limitation on judicial review would result in precisely the kind of delay in removing deportable and excludable aliens that Congress intended to avoid, and deprive the courts of an efficient mechanism for resolving constitutional and statutory claims affecting a broad class of aliens.

In sum, Petitioners' proposal to deprive district courts of jurisdiction over this infrequent but important constitutional claim has been rejected twice by the Court of Appeals, is not mandated by a proper reading of Section 242 of the INA (as amended by IIRIRA), is not supported by this Court's precedents, and would be detrimental to public policy.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

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